

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 17, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP378  
STATE OF WISCONSIN**

**Cir. Ct. No. 2010CV1331  
IN COURT OF APPEALS  
DISTRICT III**

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**JAMES SWIDERSKI,**

**PLAINTIFF,**

**ALEXANDER TRANSPORT, INC.,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ALEX SWIDERSKI, GILMAN TRACTOR & IMPLEMENT, INC., WAUPACA  
TRACTOR, INC., ANTIGO MACHINERY SALES, INC., THORP  
PROPERTIES, LLC AND MARATHON IMPLEMENT COMPANY, INC.,**

**DEFENDANTS,**

**SWIDERSKI EQUIPMENT, INC.,**

**DEFENDANT-THIRD-PARTY  
PLAINTIFF-APPELLANT,**

v.

**SWIDERSKI POWER, INC. F/K/A SEI APPLETON, INC.,**

**THIRD-PARTY DEFENDANT.**

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APPEAL from a judgment of the circuit court for Marathon County:  
ANN KNOX-BAUER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Swiderski Equipment, Inc. (SEI) appeals a judgment awarding Alexander Transport, Inc., \$774,397.38 for breaches of various oral contracts. SEI argues: (1) the court erred when it granted a directed verdict to James Swiderski, who is Alexander Transport’s president and sole shareholder, on SEI’s contention that James breached his fiduciary duty to SEI; (2) the oral contracts were not enforceable because they violated the statute of frauds; and (3) the contracts were too vague to be enforced.<sup>1</sup> We reject these arguments and affirm the judgment.

### **BACKGROUND**

¶2 SEI is a family-owned corporation and is the parent of subsidiary corporations. Intending to ultimately transfer ownership of SEI and its subsidiaries to his son James, Alex Swiderski began gifting SEI stock to James,

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<sup>1</sup> SEI also argues the circuit court’s refusal to submit SEI’s purported breach of fiduciary duty claim tainted the jury’s verdict on Alexander Transport’s breach of contract claims. Because we conclude the court properly refused to submit SEI’s purported counterclaim to the jury, we need not review whether the alleged error affected the verdict in other respects.

resulting in James' eventual ownership of thirty-four percent of the stock. In 1985, James was made vice president and director of SEI.

¶3 In 1994, Alexander Transport was formed and James was made president and majority shareholder of that company.<sup>2</sup> Alexander Transport was created to provide transportation services for SEI and other SEI subsidiaries. The parties would agree on transportation rates for trucking services, and SEI's compensation to Alexander Transport included its payment of vehicle liability and workers' compensation insurance under SEI's master insurance policy. SEI and its subsidiaries also performed truck washing services for Alexander Transport without charge, and SEI provided accounting and back office support for Alexander Transport.

¶4 James was named president of SEI in 1999, a position he held until June 2008. He was elected as a director of SEI in 2008 and remained in that position until 2011. In 2008, Alex resumed the day-to-day management of SEI and came to believe James had manipulated the relationship between Alexander Transport and SEI for James' and Alexander Transport's benefit. SEI changed the rate to be paid to Alexander Transport, and Alex advised SEI personnel not to pay Alexander Transport for services provided. SEI also stopped paying insurance premiums for Alexander Transport and began charging for truck washing services.

¶5 James and Alexander Transport brought this action against SEI and others for breach of contract. SEI filed an answer and counterclaim, and later an amended answer and counterclaim. SEI now contends James breached his fiduciary duty to SEI as its agent. The circuit court granted James' motion for

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<sup>2</sup> By the time of the trial, James owned one hundred percent of the Alexander Transport shares.

directed verdict on that question and refused to instruct the jury on James' fiduciary duties to SEI. The jury found in favor of Alexander Transport on its breach of contract claims, and the court granted a money judgment on the verdict.

## DISCUSSION

### *SEI'S PURPORTED COUNTERCLAIM*

¶6 Although the circuit court granted a directed verdict on SEI's fiduciary duty counterclaim on other grounds, we affirm its decision because we conclude James' alleged breach of his fiduciary duty to SEI was neither pled nor tried by consent. See *State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (we may affirm on different grounds than those relied on by the circuit court). In its initial counterclaim, which was later incorporated by reference in the amended counterclaim, SEI alleged James' breach of fiduciary duty in his capacity as president of Alexander Transport. The counterclaim did not allege James' breach of a fiduciary duty to SEI as its agent. The amended counterclaim added an allegation under the heading "Breach of Employee Duties Including Misappropriation of Assets and Property in Violation of WIS. STAT. §§ 895.446 and 943.20."<sup>3</sup> SEI alleged:

That James J. Swiderski was employed by Swiderski Equipment, Inc. including the time that he was operating SEI Appleton, Inc., n/k/a Swiderski Power, Inc., he owed his employer Swiderski Equipment, Inc., various duties including the duties of honesty, loyalty and fair dealing and the duty to protect and serve the best interests of his employer.

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2013-14 version.

SEI alleged James breached those duties by concealing, converting, using or otherwise misappropriating SEI assets.

¶7 A counterclaim must not only give notice of the claim, but also the grounds upon which it rests. See *Green v. Heritage Mut. Ins. Co.*, 2002 WI App 297, ¶19, 258 Wis. 2d 843, 655 N.W.2d 147. We conclude these allegations do not give James sufficient notice that SEI was alleging an independent tort claim that James breached a fiduciary duty to SEI in his capacity as an officer, director or employee of SEI. Liberally construing the counterclaim, it does not give notice of the breach of fiduciary duty SEI promotes on appeal. It does not contain the words “fiduciary,” “president” or “director.” The amended counterclaim does identify James as an employee of SEI. However, when a claim is made against an employee for breach of the agent’s duty of loyalty, that claim may sound in tort or in contract. *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶42, 294 Wis. 2d 274, 717 N.W.2d 781. Breach of a fiduciary duty of loyalty is an intentional tort. *Zastrow v. Journal Commc’ns, Inc.*, 2006 WI 72, ¶37, 291 Wis. 2d 426, 718 N.W.2d 51. To state a claim sounding in tort, the counterclaim must allege the employee was a “key employee.” *Burbank*, 294 Wis. 2d 274, ¶42. From the heading on the allegation, the lack of mention of a fiduciary relationship between James and SEI, and language suggesting breach of contract or theft by an employee, the allegations failed to give James sufficient notice of any tort claim that he breached his fiduciary duties to SEI.

¶8 SEI contends its answers to interrogatories—including supplemental responses served four days before the trial began—adequately clarified its claim by describing James’ breach of duty of loyalty and fair dealing with SEI. However, that allegation could sound in tort or contract, and the paragraph SEI cites ends with the statement: “This entire system was set up by James Swiderski

as president of Alexander Transport, Inc., in violation of the contract between the parties.” Not only did SEI’s counterclaim leave too much to be supplied by the discovery process, *see Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶36, 284 Wis. 2d 307, 700 N.W.2d 180, but its responses and discovery did not sufficiently describe its claim to put James on notice that SEI was alleging a tort claim for breach of fiduciary duty in James’ capacity as an officer, director or key employee of SEI.

¶9 Importantly, SEI’s claims were pled and tried on contract theories, not the intentional tort of breach of fiduciary duty. Even after eleven days of what turned out to be a fourteen-day trial, when called upon to explain SEI’s theories for recovery, SEI’s attorney stated: “It comes down to something very simple, was Jim following the contract?” Counsel also limited the claim of damages to the six years prior to commencement of the action, which correlates with the statute of limitations for contracts, but not for intentional torts. *Compare* WIS. STAT. § 893.43, *with* WIS. STAT. § 893.57.

¶10 The breach of fiduciary duty claim was also not tried by the parties’ consent under WIS. STAT. § 802.09(2). James’ counsel objected to the introduction of evidence that would relate to the damages SEI claimed for breach of fiduciary duty, noting: “There’s no claim. There’s no counterclaim. There’s no setoff claim. There’s nothing against ATI<sup>[4]</sup> or against Jim that I’ve seen in the pleadings relating to that.” In response, SEI’s counsel did not speak to a breach of fiduciary duty tort claim, but rather invoked the offsetting of contract damages in the sense of an affirmative defense. Counsel stated, in relevant part: “[W]e’re alleging that [Alexander Transport was] paid by virtue of the value of the services

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<sup>4</sup> “ATI” was an abbreviation used in the circuit court to refer to Alexander Transport.

by SEI to ATI over the time; that there's nothing due because our services, actually the value of the services provided to ATI exceed the claim by ATI against SEI." Given the record, we cannot conclude that a tort-based breach of fiduciary duty claim was tried by consent.

*SEI'S DEFENSES TO THE CONTRACT ACTION*

¶11 SEI contends Alexander Transport's contract claims should have been dismissed on summary judgment because the oral contracts violated the statute of frauds in that they were intended to be longstanding and not capable of being executed within one year. *See* WIS. STAT. § 241.02. However, a contract for hire for an indefinite term that is terminable at will is a valid contract, even though it is not in writing. *Marek v. Knab Co.*, 10 Wis. 2d 390, 393-94, 103 N.W.2d 31 (1960). Here, although the contracts had been in place for many years, they were terminable at will. SEI's breach of contract did not consist of terminating the agreement, which it never did prior to the commencement of this lawsuit. Rather, it discontinued payment for services under the agreement without terminating it. Because the contracts were terminable at will, the statute of frauds does not apply.

¶12 SEI also contends the contracts were too vague and uncertain in their essential terms to be enforceable. The contracts had been in place for fifteen years. As in *Nelsen v. Farmers Mutual Automobile Insurance Co.*, 4 Wis. 2d 36, 50, 90 N.W.2d 123 (1958), it can hardly be maintained that the terms of the contracts were so vague and indefinite as to be incapable of mutual understanding when they governed the parties' relationship for many years. The agreements as found by the jury were not complicated. Alexander Transport owned trucks and employed their drivers. SEI would use the trucks in exchange for an agreed-upon rate per mile, and it provided insurance coverage, truck washing services and

accounting services for Alexander Transport. The rate was initially set by the parties and was changed infrequently over the next fifteen years. Contrary to SEI's argument, it does not matter for purposes of this issue of contract law that James was involved with both Alexander Transport and SEI at the time. The parties' long history of performing subject to the oral contracts defeats SEI's contention that the contracts were too vague to be enforced.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

